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No. 79-1171

IN THE

Supreme Court of the United States

October Term, 1979

STATE OF MINNESOTA,

Petitioner,

vs.

CLOVER LEAF CREAMERY COMPANY, PHILLIPS PETROLEUM COMPANY, MARIGOLD FOODS, INC., UNILOY DIVISION OF HOOVER UNIVERSAL, INC., WEBER & BARLOW STORES, INC., THE SOCIETY OF THE PLASTICS INDUSTRY, INC., WELLS DAIRY, INC., and M-H PACKAGING SYSTEMS, INC.

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Did the Minnesota Supreme Court correctly hold that a statutory ban on the sale of milk in nonreturnable, nonrefillable plastic containers violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

2. Does a statutory ban on the sale of milk in nonreturnable, nonrefillable plastic containers discriminate against or unreasonably burden interstate commerce in violation of Article I, Section 8 of the United States Constitution?[1]

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[1] This question was not decided by the Minnesota Supreme Court and is therefore not raised by the petitioner. It was included in the Complaint, decided by the trial court, fully briefed and argued before the Minnesota Supreme Court, and asserted in respondents' brief in opposition to the State's petition for certiorari. Respondents may therefore assert it in support of the judgment of the Minnesota Supreme Court, and it is appropriate for this Court to decide this question if it does not invalidate the statute on equal protection grounds. New York City Transit Authority v. Beazar, 440 U.S. 568, 582 n.24 (1979); Hankerson v. North Carolina, 432 U.S. 233, 240 n.6 (1977); California Bankers Ass'n. v. Schultz, 416 U.S. 21, 71 (1974); Dandridge v. Williams, 397 U.S. 471, 475 n.6 (1970).

The Minnesota Supreme Court concurred with the trial court's determination that the statute also denies substantive due process of law but did not decide this question directly. (A. 45 n.20.)

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BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

The evidence in this case is crucial to its determination. The Statement of the Case in the Minnesota Attorney General's brief is neither complete nor accurate. To avoid undue length and repetition, plaintiffs will review the environmental and economic impacts of the statute in their argument.

Laws of Minnesota 1977, Chapter 268 (the Act) imposes an absolute ban. It is a crime to sell milk in nonrefillable[2] plastic containers under any circumstances.

Milk is the only commodity affected by the Act. No plastic container is banned unless it is filled with milk, even though the same container is used for fruit juices (R. 445, 457) and similar plastic containers are used for many other substances, including windshield washer fluid, laundry bleach and household cleaners.

Minnesota is the only state that has banned any kind of milk container. Other container legislation has been directed at the safety and environmental problems caused by the littering of beer and soft drink containers—problems distinctly different from those allegedly addressed by the Minnesota statute at issue in this case.

The Minnesota Pollution Control Agency has no plans to propose any further action on the subject of milk containers. (R. 648-649.) Since passage of the Act, no further legislation regarding milk containers has been proposed.[3]

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[2] A container can be returnable without being refillable, e.g., the plastic milk bottle at issue here can be returned for recycling but cannot be used again to package milk. Throughout this brief the term "nonrefillable" is used to describe containers which cannot be used again to package milk.

[3] Nor does the U.S. Environmental Protection Agency, which commissioned the milk container study done by the Midwest Research Institute (R. 152), have any plans to propose such action. (Ades Deposition, received in evidence, p. 18.) The *amicus curiae*

The unique nature of this Minnesota statute is explained by its true purpose. While giving lip service to environmental concerns, the legislative debates indicate that the intent of the bill was to discriminate against the out-of-state plastics industry. As discussed in detail in our argument, the bill's proponents wanted to isolate local industries from out-of-state competition under the guise of environmental legislation.

SUMMARY OF ARGUMENT

The Minnesota Supreme Court, in declaring the Act violative of federal equal protection guarantees, has not assumed the role of "super-legislature." While legislative bodies enjoy great latitude in dealing with perceived social evils, that latitude is not unlimited. It must be exercised within constitutional limits. The Court's role, central to the functioning of our political system, is to safeguard those limits. It does so by applying established standards to facts of record.

Plaintiffs introduced evidence necessary to meet the substantial burden they carried in challenging the constitutionality of the Act. The Minnesota courts made extensive findings of fact which are amply supported by the evidence and concluded that no credible facts exist upon which the legislature could rationally base the classification contained in the Act; it is not rationally related to furthering any of its alleged environmental purposes.

A legislature may act step-by-step to ameliorate a perceived evil. The mere fact that the legislature has acted does not mean, however, that such a step has been taken. The step must be rationally directed toward a legitimate goal. Eliminating

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brief of the United States notwithstanding, no agency or department of the United States has recommended statutory or regulatory action to ban or otherwise restrict the use of plastic or any other type of milk containers.

the plastic milk bottle, thereby transferring its market share to the environmentally inferior paperboard container, cannot rationally be perceived as likely to further the stated environmental goals of the Act.

The Court's peculiar role in safeguarding the constitutional limits of legislation is particularly important when legislation has interstate consequences. Those consequences are of less concern to a legislature than local ones. The illusory nature of the stated environmental purposes of the Act is understood by an examination of its true purpose as revealed by the legislative debates and by its practical effect: to protect local paper and timber interests against competition from the out-of-state plastics industry. The Act exceeds Commerce Clause limitations because it is "hostile in conception as well as burdensome in result." *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366, 381 (1976).

The Act contravenes the Commerce Clause even without a finding of discriminatory motive. It discriminates in its operation, and the stated goals can be promoted with less discriminatory and more effective alternatives. Moreover, the substantial burdens on interstate commerce outweigh the illusory benefits of the Act.

ARGUMENT

I. THE EVIDENCE SUPPORTS THE FINDINGS OF THE MINNESOTA COURTS THAT THERE IS NO FACTUAL BASIS FOR BANNING THE PLASTIC MILK CONTAINER.

A review of the Minnesota courts' findings and the supporting evidence is provided here as a framework for the legal analysis to follow. This discussion utilizes primarily the semantics of equal protection because the Minnesota Supreme Court focused its decision on this issue. However, the same findings which compel the conclusion that the Act lacks rationality and thus denies equal protection also compel the conclusion that the Act is in conflict with Commerce Clause limitations.[4]

The Minnesota Attorney General suggests several public purposes to be served by Chapter 268. He claims that it is

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[4] This Court is bound by factual findings of lower courts unless they are clearly erroneous or the result of "a very obvious and exceptional showing of error," particularly when there are concurrent findings by two lower courts. Berenyi v. District Director, Immigration and Naturalization Service, 385 U.S. 630, 635-636 (1967). The Court has conducted an "independent review" of the evidence when the party challenging the lower court decision has asserted a constitutional right involving either procedural due process in a criminal case, *e.g.*, *Pierre v. Louisiana*, 306 U.S. 354 (1939), or civil liberties, particularly those under the First Amendment, *e.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); Bachellar v. Maryland, 397 U.S. 564 (1970). But in cases affecting economic interests, *e.g.*, General Motors Corp v. Washington, 377 U.S. 436, 441-442 (1964), and even in some criminal cases, *e.g.*, Gallegos v. Nebraska, 342 U.S. 55, 61 (1951) and First Amendment cases, Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 68 (1963), the Court has deferred to lower court findings when they are supported by the evidence. *See generally* Strong, *The Persistent Doctrine of "Constitutional Fact,"* 46 N.C. L. Rev. 223 (1968). In this case the Court is confined to the application of constitutional principles to the findings of the Minnesota courts because they have an evidentiary basis.

proper to ban only the plastic milk bottle because the container is new in Minnesota and that the Act will promote the use of refillable containers. The statement of policy in the Act asserts that the plastic milk bottle "presents a solid waste management problem for the state, promotes energy waste and depletes natural resources."

Neither Minnesota court found any rational nexus between these purposes and the means chosen to effect them. Furthermore, the trial court specifically found that the actual purpose of the Act was to protect private local economic interests from out-of-state competition, not to protect the environment.

A. The purpose of Chapter 268 was not to protect the environment, but to protect and isolate local private economic interests.

The evidence presented at trial revealed, as discussed below, that no legitimate environmental basis exists for this legislation. Transcripts of the House and Senate floor debates on the bill were received at trial and confirm the inferences that follow from this evidence: protection of the environment was not the real purpose of the Act.

The Minnesota Attorney General relies heavily on selected legislative speeches to buttress the asserted purposes of the Act. However, when the fallacies of these asserted purposes became apparent during the debates, proponents of the bill made it clear that their primary objectives were to insulate small dairies from competition and to protect local timber and paper interests from competition from the out-of-state plastics

industry. (See pp. 30-31, *infra.*) The trial court found these to be the actual purposes of the legislation. (A. 19, 22.)[5]

B. The plastic milk bottle has been widely used in Minnesota for years.

The Minnesota Attorney General argues that the Act was designed to prevent a new container from gaining a foothold in Minnesota. On the contrary, as found by the Minnesota Supreme Court, use of the container had been established in many areas of the state in the early 1970's. (A. 44.)

Marigold Foods, Inc. (Marigold) is a dairy with a trade area including most of Minnesota and several adjoining states. (R. 448.) It began using the plastic bottle in 1973.[6] (R. 449.) By 1978 Marigold no longer packaged any milk in paperboard gallons at its main plant in Rochester, Minnesota. (R. 453-454.) In 1977 the volume of milk sold by Marigold in plastic gallons exceeded its sales in paperboard gallons by almost 17 to 1. (R. 454.) At least one of its customers, Weber and Barlow Stores in Rochester, had completely discontinued purchasing milk in paperboard gallons in favor of plastic gallons. (R. 411.)

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[5] "12. Despite the purported policy statement published by the Legislature as its basis for enacting Chapter 268, the actual basis was to promote the economic interests of certain segments of the local dairy and pulpwood industries at the expense of the economic interests of other segments of the dairy industry and the plastics industry."

. . .

"23. Despite the purported policy reasons published by the Legislature as bases for enacting Chapter 268, actual bases were to isolate from interstate competition the interests of certain segments of the local dairy and pulpwood industries. The economic welfare of such local interests can be promoted without the remedies prescribed in Chapter 268."

[6] Before 1973 the paperboard carton had become the predominant milk container in Minnesota, having virtually eliminated refillable containers from the market. (R. 467-468.)

Wells Dairy, Inc. (Wells), an Iowa dairy, also began use of the plastic bottle in Minnesota in 1973. (R. 421.) By 1978 its ratio of plastic gallon sales to paperboard gallon sales was 40 to 1 (R. 419), with the plastic gallon accounting for 60 percent of its total sales. (R. 426.) Approximately ten percent of Wells' milk sales is in Minnesota (R. 428), including one million gallons per year in plastic bottles. (R. 430-431.)

Clover Leaf Creamery Company (Clover Leaf), a Minneapolis-based dairy, first considered the use of the plastic bottle in the mid-1960's. (R. 326.) In 1971 the Minnesota Pollution Control Agency (MPCA) assured Clover Leaf that it would conduct studies on the environmental effects of the plastic container, causing Clover Leaf to cancel an order for a plastic bottle blow-molding machine. (R. 327-328.) No studies were ever conducted by the MPCA. (R. 645.) When the 1976 draft of the Midwest Research Institute study indicated that there was no environmental basis for preferring the paperboard carton over the plastic bottle, Clover Leaf decided to begin using plastic. (R. 330-331.) It ordered the machinery in 1976 (R. 331) and began production of the plastic bottle at its Minneapolis plant by January 1977. (R. 332.) It uses plastic throughout its market area, i.e. within 200 miles of Minneapolis. (R. 326, 332.) By January, 1978, approximately 60 percent of all milk sold by Clover Leaf in gallon containers was in plastic, the remaining 40 percent in paperboard. (R. 340.)

The plastic bottle has been used extensively by other dairies throughout the state, except in the Twin Cities metropolitan area, since as early as 1968. (R. 329, 353-354.)

Although Marigold, Wells and Clover Leaf have their own equipment for making plastic bottles, dairies need not have such equipment. Some have purchased plastic bottles from bottle manufacturers for several years and, more recently, from

other dairies with excess bottle-making capacity, at a price less than that paid for paperboard cartons. (R. 291-292, 303, 353-354, 427, 450.) In addition, the cost of the equipment was grossly exaggerated during the legislative debates. (R. 114, 247.)

Ample evidence supports the conclusions of the Minnesota courts that the Act may not be sustained as a measure to prevent the plastic bottle from gaining a foothold in the Minnesota milk market.

C. The Act will not encourage or promote a return to the use of refillable containers.

The Minnesota Attorney General argues that the Act is designed to halt the trend toward nonrefillable containers and promote the use of refillables. The trial court found "no credible evidence" to substantiate this claim. (A. 25.) The Minnesota Supreme Court concluded that "the evidence conclusively establishes" that this goal will not be furthered by the Act. (A. 42.)

In Minnesota the paperboard carton had virtually eliminated refillables from the market before plastic was introduced. Thus Minnesota consumers have switched, not from refillable bottles to plastic, but from nonrefillable paperboard to nonrefillable plastic. If Chapter 268 goes into effect, the dairies will go back to the paperboard carton. (R. 339-340, 427.) Some dairies do not even have the facilities necessary to wash refillable bottles, and regulatory restrictions (which did not exist in the days of the glass milk bottle) on the volume and content of sewage generated by the bottle-washing process

would pose serious problems for these dairies and the municipalities in which they are located. (R. 424-425, 454-455.)[7]

In 1977 Clover Leaf made a concerted but abysmally futile effort to revive the refillable milk bottle. (R. 332-340.) Consumers did not purchase milk in the refillable bottle, even when the only alternative in a particular store was the paperboard carton (R. 368-369) and even though the price charged to the retailer by Clover Leaf for milk in the refillable container was four cents less per gallon than the price for milk in either of the nonrefillable gallon containers. (R. 358.)[8] Clover Leaf had to take back large quantities of milk (R. 334) and finally sold several thousand unused refillable bottles at a loss. (R. 339.)

Since no other state has ever banned plastic milk containers, the Minnesota Attorney General points to the Province of Ontario as the model to be followed. However, even Ontario's ban (by administrative fiat), which included both the plastic container and the large paperboard carton, has failed. Consumers there have turned in large numbers to the third nonrefillable alternative, the plastic pouch. This is particularly significant because the refillable had high visibility and a very large market share in Ontario when the ban went into effect. The market share of refillables dropped from 47 percent when the ban was issued in 1971 to 19.7 percent in 1977. (Endicott Deposition, received in evidence, pp. 88-89; Endicott Depos. Ex. 6, p. 5.)

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[7] Refillable milk bottles also create sanitation problems which make the Minnesota Department of Agriculture reluctant to encourage their revival in Minnesota. (Pl. Ex. U; R. 335-337.)

[8] Clover Leaf acknowledges the environmental advantages of the refillable containers but is convinced that the use of refillables will not increase unless all nonrefillables are prohibited. (Def. Ex. 3; R. 339-340, 361-362.)

Plaintiffs' witness from the United States Environmental Protection Agency did not believe that the Act will cause refillables to make a comeback in Minnesota. (Ades Depos. pp. 20, 37-38.)

The evidence supports the findings of the Minnesota courts that Chapter 268 will not promote the use of refillable milk containers.

D. The Act will not aid in the management or control of solid waste. It will aggravate the environmental problems caused by solid waste.

The Minnesota Supreme Court concurred with the trial court and held that "the evidence conclusively demonstrates that plastic nonrefillables present fewer solid waste problems than paper containers." (A. 40.)

There are several methods of handling and reducing solid waste, including landfills, incineration, recycling, litter control, and source reduction. The evidence showed that with all applicable methods the plastic bottle is environmentally superior to the paperboard carton.

1. Landfills.

The predominant method of solid waste disposal is deposit in landfills. (R. 67.)

a. Leachates and methane gas.

The State's witnesses agreed that the worst environmental hazards posed by landfill operations are pollution of groundwater caused by leaching and the creation and escape of methane gas. (R. 594, 652.) The Metropolitan Council of the

Twin Cities has recognized the magnitude of these problems in existing landfills in the Minneapolis-Saint Paul area. (R. 595-597; Pl. Ex. AA.) The major objective in designing landfills is to control or minimize the effects of leachates and gases.

Both of these hazards are created by waste decomposition. Bacterial and other chemical reactions, combined with percolation of water and other liquids, create leachates that seep into the ground and ultimately into underground water. These same reactions create methane gas, which is both noxious and explosive. (R. 72-74, 385-386, 594.)

Paperboard milk cartons aggravate these problems when they are deposited in landfills because they decompose after the plastic coating is punctured or torn. (R. 73, 617.) Plastic bottles, on the other hand, are essentially inert and do not contribute to the creation of leachates and methane gas. (R. 72-73, 595.) Plastic is in fact used to make liners for landfills to prevent contamination of groundwater by seepage of leachates. (R. 73-74.)

The trial court (A. 20) and the Minnesota Supreme Court (A. 35-36) emphasized this distinction between the two containers.

b. Landfill stability.

Another disadvantage of waste decomposition is that it makes the landfill site unstable after it has been filled, thus preventing the site from being used for many kinds of building construction. (R. 72-73, 385.) Stable sites do, however, have many uses, including parking lots, playing fields, and ski hills. (R. 381-382.) Stability is also required to minimize cracking of the final landfill cover and the resulting generation of more leachates. (R. 385.)

As found by the trial court (A. 20) and Minnesota Supreme Court (A. 36), plastic bottles contribute to landfill stability; paperboard cartons do not.

c. Compaction of solid waste.

The procedure followed in collecting and depositing waste and the physical characteristics of plastic and paperboard containers indicate that plastic bottles consume no more space in landfills than paperboard containers, and that under total compaction plastic containers will consume even less space.

Waste is generally collected and transported to landfill sites in large trucks with hydraulic compacting equipment. During collection the waste is compacted to a small fraction of its original volume. (R. 386-387.) At the landfill, procedures and equipment are specially designed to compact the waste further and keep it compressed. (R. 383-384, 386, 394-395.) Compacting machines resembling large tractors have huge metal wheels with spikes or cleats to puncture and compact the waste. (R. 388-393; Pl. Ex. V, W, X, Y and Z.) They weigh approximately 50,000 pounds and can flatten steel drums, refrigerators and automobiles. (R. 389, 391-392.) When filled the landfill may be as much as 150 feet deep. (R. 386.)

The Minnesota Attorney General ignores the evidence adduced at trial when he asserts that the Midwest Research Institute (MRI) determined that plastic bottles occupy more landfill space than paperboard cartons. While the numbers in the MRI Report purport to indicate this, testimony by Plaintiffs' witnesses, Mr. Welch, the principal investigator from MRI, and Mr. Ades of the United States Environmental Protection Agency, and a review of the document which formed the sole basis for the compaction figures reveal that

these figures are erroneous.[9] Mr. Welch opined that there was insufficient evidence to conclude whether either gallon container would consume more landfill space than the other. (R. 194-195, 199-200.)

As indicated by the trial court (A. 25-26) and the Minnesota Supreme Court (A. 38), the contrary conclusions of Harold Samtur, the State's solid waste expert, were entitled to little credence.[10] His testimony demonstrated a remarkable lack of familiarity with the sources on which he purportedly relied and a corresponding disinclination to examine their validity and meaning.[11]

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[9] Neither witness Welch nor Ades believes these figures to be credible. (R. 173-174, 177-178; Ades Depos. pp. 15-16.) They were based on a three-page report supplied to MRI by the American Paper Institute. (R. 169-171, 197; Pl. Ex. O.) This document, though included by MRI as the only "study" available, was virtually meaningless because (1) it neglected to specify the weights of the containers used (R. 173-174), and (2) the test conducted did not even roughly approximate conditions in a landfill, e.g., it measured the volume of the containers after being crushed once with a laboratory device and then being totally released, with no continuing pressure being exerted on them. (R. 179-181.)

[10] The Minnesota Attorney General suggests that the mere existence of a difference of opinion is all that is necessary to sustain a statute. He is in error. Just as the presumption of constitutionality does not immunize a statute from judicial scrutiny, "nor is such an immunity achieved by treating any fanciful conjecture as enough to repel attack." Borden's Farm Products Co., Inc. v. Baldwin, 293 U.S. 194, 209 (1934). Courts are not bound to accept blindly the testimony of witnesses for any party in constitutional litigation. It is subject to cross-examination and evaluation the same as the testimony of any witness in any other trial. If an opinion is not legitimately founded or lacks credibility, the mere fact that it is asserted is without probative value.

[11] Samtur relied on three sources: (1) The MRI Report. He accepted the figures on post-consumer solid waste without examining their derivation and in spite of Welch's testimony about their inadequacy. (R. 604-605, 607-609.); (2) The "study" done in Ontario. (R. 604.) The Ontario researchers estimated the compaction ratio for a *refillable* plastic bottle and then assumed that the much lighter plastic nonrefillable would consume the same space. (Endicott Depos. p. 74.) They also used a nonrefillable plastic bottle that is not comparable to the bottle now used in Minnesota because it was almost 50 percent heavier and thus more difficult to crush. (Endicott Depos. pp. 9, 75-76.); (3) The so-called Eggshell Report, a 1969 study of disposability characteristics of containers which did not include milk containers in the samples used. (R. 508, 513, 574-575; 606-607.)

During cross examination of Mr. Samtur, counsel for Plaintiffs crushed samples of both the nonrefillable plastic gallon and the paperboard gallon with his bare hands. (R. 609-614, Pl. Ex. BB and CC.) Samtur estimated that the crushed volume of each container was between ten and twenty percent of its original volume. (R. 611, 613.) He acknowledged that there was virtually no springback of the plastic bottle after it had been crushed and released, and that any such springback could be eliminated by squeezing the container between the thumb and forefinger. (R. 611-612.) The State made no effort to rebut this demonstration.[12]

The Minnesota Supreme Court sustained the trial court's finding that the two containers occupy substantially the same amount of landfill space. (A. 36.) It also agreed with the trial court that Samtur's opinions had a "weak and inconclusive foundation" and "lacked convincing quality." (A. 38.)

2. Incineration.

Solid waste can be incinerated and used to create energy. This method of disposal will become more widespread as technology enables the economical use of the energy value of the heat generated by incineration. (Def. Ex. 9, pp. 33-44; R. 490.)

Both plastic bottles and paperboard cartons burn. (R. 186.) Plastic, however, has a much higher BTU value (R. 186), which results in the recovery of more energy than that recovered from burning paperboard cartons. (R. 68-71, 323.) Unlike paperboard, plastic also incinerates completely and does not emit noxious gases into the atmosphere. (R. 69-70.)

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[12] If total compaction is achieved, i.e., no void spaces are left in the containers, plastic containers will occupy less landfill space than paperboard containers, because the former contain much less raw material by weight and have a greater density. (R. 578-579.)

The trial court (A. 20) and Minnesota Supreme Court (A. 38-39) recognized these distinctions.

3. Recycling.

Another method of solid waste disposal is recycling. Plastic milk containers are recyclable because they can be reground and used to make a large number of other polyethylene products. Paperboard milk cartons are not recyclable because the paperboard and the plastic coating cannot be separated. (R. 74-76, 185-186, 346.)

Clover Leaf has a voluntary plastic milk bottle recycling program. It picks up plastic milk bottles that are returned to the retail stores, grinds them and sells the plastic material to a salvage dealer. (R. 346-348.) Similar programs exist elsewhere. (R. 75; Ades Depos. pp. 26-27.)

The Minnesota legislature has adopted an express statutory policy to encourage the reuse and recycling of materials. Minn. Stat. §116F.01. The trial court found that Chapter 268 does not promote this legislative goal. (A. 21.)

4. Litter control.

The State agrees that litter control is not one of the purposes of Chapter 268. (R. 646.) Milk, especially when purchased in large containers, is consumed in the home. The containers are not littered, but directly enter recycling or trash collection systems. (R. 76.)

Other container legislation throughout the country, including that cited by the Solicitor General (Brief for the United States as *Amicus Curiae*, p. 9), has been directed at the prob-

lems created by littering containers of other beverages. None of that legislation affects milk containers.[13]

The plastic milk bottle also differs from the paperboard milk carton and nonrefillable containers used for other beverages in that it is preferred by consumers for reasons other than disposal convenience. The screw-on cap prolongs the freshness of the milk and eliminates contamination by refrigerator odors. The built-in handle enables the user to pour with one hand even though the container is large. The paperboard carton does not have these features, and sanitation restrictions prevent the use of a refillable milk container with a screw-on cap or built-in handle. (R. 357-358, 365, 450.)

5. Source reduction.

The Act is cited by the Minnesota Attorney General as a "source reduction" measure, i.e., it allegedly will reduce the amount of solid waste to be handled. As discussed above, the Act is not rationally related to this purpose because it will not revive refillables and the amount of space consumed in landfills is substantially the same for the two presently used containers. The act is in fact counterproductive because, as stated by the Minnesota Supreme Court, "The major relevant source-reduction factor is the constantly declining weight of plastic nonrefillables." (A. 39.)

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[13] The instant statute is unprecedented. It is totally different in purpose and effect from all those cited by the Solicitor General and from those upheld by other courts. See Can Manufacturers Institute, Inc. v. Minnesota, 289 N.W.2d 416 (Minn. 1979); American Can Co. v. Oregon Liquor Control Commission, 15 Or. App. 618, 517 P.2d 691 (1973); Anchor Hocking Glass Corp. v. Barber, 118 Vt. 206, 105 A.2d 271 (1954). The only other statute banning a plastic container has been invalidated. Juice Tree Hawaii, Inc. v. Yuen, 13 E.R.C. 1888 (Hawaii Cir. Ct. 1979). Plaintiffs do not challenge container legislation *per se*. The scope of this case is very limited, and it must be decided on its own facts.

The weight of the plastic bottle is little more than half that of the paperboard carton; it generates much less waste. While the weight of the gallon paperboard carton has remained at 115 grams for several years (R. 245, 344, 422-423), improvements in resin, machinery and design have substantially reduced the weight of the plastic bottle, even since 1973. (R. 244-245, 285, 310, 341, 423, 453.) This reduction causes a proportional decrease in the amount of raw material used, the amount of waste generated, and the other environmental impacts. (R. 168-169.)

The Act is also counterproductive insofar as it promotes the use of smaller containers. Source reduction is accomplished by packaging products in larger containers which reduces the amount of container material per unit of product. (R. 156, 584.) The plastic milk bottle is used in Minnesota only in the gallon size, thus promoting source reduction. Paperboard cartons are used in several sizes. Source reduction will be impeded to the extent that consumers, finding the plastic gallon unavailable, choose to purchase milk in smaller paperboard containers rather than in the cumbersome (R. 450) gallon size.

E. The Act will not aid energy conservation.

The energy argument advanced by the Minnesota Attorney General derives from the premises that plastic is inherently bad and that banning any plastic product will automatically result in more oil and gas being made available for fuel. Both the trial court and the Minnesota Supreme Court found, however, after reviewing the evidence discussed below, that the Act is not rationally related to achieving this result and that the paperboard carton actually consumes more energy than the plastic bottle. The energy conservation aspect of the Act

is illusory and the Act "is not reasonably related to the state's interest in preventing energy waste." (A. 42.)

Plastic milk bottles are made from high density polyethylene (HDPE), which can be derived from virtually any material that contains carbon and hydrogen, such as coal, water, and even air. (R. 30-31.) The principal current sources for HDPE and other plastics are crude oil and natural gas. (R. 31.)

The Minnesota Attorney General's assertion that plastic milk bottles consume natural gas that would otherwise be available for fuel is fallacious. The extraction of polyethylene from natural gas for productive use is a relatively recent phenomenon. (R. 32.) Ethane, from which polyethylene is derived, is a component of the natural gas stream that is used for petrochemicals. It used to be (R. 32) and sometimes still is (*see Wall St. J.*, June 10, 1980, at 11, col. 1 (East Coast ed.)) burned off as a "waste" product at refineries.

Much of the expert testimony at trial centered around the MRI Report. The testimony of Mr. Welch consisted in large part in clarifying the report in order to compare the energy impacts of the nonrefillable pastic and paperboard containers. Welch computed the impacts for 65- and 60-gram containers, because the Report studied the 70-gram container and the size in predominant use had since been reduced to 65 grams. (R. 245, 285, 341, 453.) These computations are contained in Plaintiff's Exhibit L (R. 157-158) and show that the impact of the plastic bottle is reduced in every category as the weight of the bottle is reduced. (R. 168-169.)[14]

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[14] Throughout the MRI Report and related exhibits (such as Exhibit L), a higher number means a greater, and thus environmentally more adverse, impact (e.g., pounds of material consumed, BTU's of energy used). (R. 159-160.)

All of the environmental impacts are greater for the paperboard half-gallon than for the paperboard gallon because the former uses more container material per unit of milk. (See Pl.

The MRI Report (and Exhibit L) computed two values for the energy impact of the paperboard container, one including and one excluding the energy value of the wood waste generated by the paperboard manufacturing process. (See Pl. Ex. I, pp. 3-4.) Welch testified that a meaningful comparison of the two containers requires inclusion of the wood waste energy. (R. 162-163.) This comparison (see Pl. Ex. L) shows that the paperboard carton uses slightly less energy than the 70-gram plastic bottle but more energy than the 65-gram and 60-gram plastic bottles.

The MRI Report recognizes that the true energy picture goes far beyond the nature of the raw material used. Welch concluded that the energy impact of the plastic bottle and paperboard carton systems is virtually identical. (R. 194, 199.) If one either includes the energy value of the raw materials for both containers or excludes it for both containers, then paperboard has a significantly greater adverse environmental impact. (R. 160-161, 163-166; Pl. Ex. M.) Moreover, the energy impact of the plastic bottle will continue to decline as the weight of the bottle continues to be reduced.[15]

Ex. I, pp. 8-9.) Comparing the plastic gallon to the paperboard gallon (as is done in Exhibit L) is therefore more favorable to the paperboard system than comparing the plastic gallon to two paperboard half-gallons. If the ban on plastic were to result in greater use of the paperboard half-gallon (because of the disadvantages which the paperboard gallon poses for the consumer), the adverse environmental effects of the Act would be greater than if consumers merely switched to the paperboard gallon.

[15] The State introduced voluminous exhibits and testimony regarding studies in Ontario which purport to show significantly greater consumption of energy by the plastic bottle. The Ontario studies are of little value because: (1) they used an 80-gram plastic bottle; (2) they arbitrarily excluded the energy consumed in manufacturing the paper container material (Endicott Depos. Ex. 13, p. 251); and (3) the more recent Ontario report on energy (Endicott Depos. Ex. 5), prepared supposedly because of improvements in energy analysis techniques since the first study (Endicott Depos. p. 18), did not even evaluate the nonrefillable plastic container. (Endicott Depos. p. 81.)

If anything, the Act will simply promote the greater consumption of energy and raw materials by the paper industry. It is noteworthy that no Minnesota industry consumes energy or raw materials to produce crude oil, natural gas, HDPE or any other plastic resin. (R. 167-168, 309.)

F. The Act will not lessen the consumption of natural resources.

Chapter 268 will not result in less consumption of natural resources, renewable or nonrenewable. As found by the trial court, "Both petroleum and wood are natural resources subject to depletion from innumerable sources, one of the least being milk containers." (A. 20.) The Minnesota Supreme Court stated, "The amount of crude oil and natural gas used for producing plastic nonrefillables is so small that a ban on plastic nonrefillables will not alter the volume of resources consumed for non-fuel purposes. If any container is likely to have the potential for reducing depletion of natural resources, it is the plastic nonrefillable" because its weight is continually being reduced and it is recyclable. (A. 42.)

G. Other environmental factors further demonstrate the superiority of the plastic bottle.

In the words of the Minnesota Supreme Court, "When other environmental factors are considered, the superiority of plastic nonrefillables is more evident." (A. 42 n.19.)

The system of producing the paperboard carton (1) consumes much more water, (2) generates much more waterborne waste, (3) consumes much greater quantities of raw materials, and (4) generates more industrial solid waste. (R. 158-159, 166-168; Pl. Ex. L.) These comparisons are par-

ticularly significant in Minnesota because the impacts generated by the paperboard carton are all felt within Minnesota. While the plastic bottle system creates more atmospheric emissions, these do not occur in or near Minnesota. (R. 167-168.)

II. THE ACT DENIES PLAINTIFFS EQUAL PROTECTION OF THE LAWS.

Plaintiffs agree that the appropriate test for determining the constitutionality of this unique Minnesota statute is whether the classification created by the Act is rationally related to furthering a legitimate state interest. Both the Minnesota Supreme Court and the trial court applied that standard to the facts of this case and concluded that the Act violates the Equal Protection Clause. (A. 23, 45.)

Plaintiffs acknowledge the burden that they carried in successfully challenging the constitutionality of the Act in the Minnesota courts. Statutes are presumptively constitutional, and judges do not determine the wisdom of legislative acts. But the presumption of constitutionality is nothing more than a presumption "of the existence of factual conditions supporting the legislation" and is therefore rebuttable. *Borden's Farm Products Co., Inc. v. Baldwin, supra,* note 10, 293 U.S. at 209. Like all civil presumptions, it is procedural and vanishes when credible rebutting evidence is received. Fed. R. Evid. 301; Minn. R. Evid. 301 (identical counterpart to federal rule).

A. The purpose of the Act is not a legitimate one.

This Court has held that "[T]he mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." *Weinberger v. Wiesenfeld,* 420 U.S. 636,

648 (1975). In a footnote to this statement, the Court further observed:

> This Court need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation.

Id. at 648 n.16. This principle is no less applicable when the "benign, compensatory purpose" is purportedly environmental:

> Our society and its governmental instrumentalities, having been less than alert to the needs of our environment for generations, have now taken protective steps. These developments, however praiseworthy, should not lead courts to exercise equitable powers loosely or casually whenever a claim of "environmental damage" is asserted. The world must go on and new environmental legislation must be carefully meshed with more traditional patterns of federal regulation.

Aberdeen & Rockfish R. Co. v. SCRAP, 409 U.S. 1207, 1217-1218 (1972) (dictum) (Burger, C. J., sitting as circuit judge).

As discussed in detail below at pages 30-31, the legislative history demonstrates, and the trial court found, that the Act's "actual bases were to isolate from interstate competition the interests of certain segments of the local dairy and pulpwood industries." (A. 22.) This legislative purpose does not constitute a legitimate state interest. Consequently the Act violates the Equal Protection Clause whether or not the means chosen would further the actual legislative goal.

B. Even if the purpose of the Act were among the purposes stated in its preamble, the classification contained in the Act is not rationally related to furthering any stated purpose.

Plaintiffs agree that the purposes of the Act as asserted in its preamble represent legitimate state purposes. However, plaintiffs' evidence convinced the Minnesota courts that no credible facts exist to distinguish the paperboard container from the plastic in such a way that their differing treatment under the Act furthers any of those purposes.

In one of the most recent decisions in which the Court applied the standard of rationality, the burden of those challenging the legislative enactment was described as follows:

> [They] must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.

Vance v. Bradley, 440 U.S. 93, 111 (1979). Plaintiffs introduced voluminous evidence and successfully met this substantial burden.

The Minnesota Attorney General and supporting *amici* would impose an impossible burden of proof on plaintiffs: they apply a standard requiring the introduction of evidence but would preclude courts from considering it. The trial court and the Minnesota Supreme Court carefully considered the evidence of record. Contrary to the contention of the Minnesota Attorney General, the Minnesota Supreme Court's consideration of the facts was proper and required.[16]

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[16] The Minnesota Attorney General suggests that the court may search its own mind in preference to the record for facts upon which the legislature might conceivably have based its classifica-

It is not disputed that the appropriate standard of judicial review is a limited one. The Minnesota Attorney General observes that in the last 50 years the Court has invalidated only one economic regulation as violative of equal protection and that its decision in that one case was subsequently overruled. (Pet. Brief p. 28.) That observation ignores the "noneconomic" regulations which have been invalidated under the very same standard. In *Rinaldi v. Yeager*, 384 U.S. 305 (1966), for example, the Court invalidated a New Jersey statute requiring that the cost of trial transcripts be deducted from the earnings of imprisoned indigent defendants as not rationally related to the state's fiscal objective. Recently the Court summarily affirmed a decision of the Eighth Circuit which held there was no rational basis for a statutory classification which denied pre-pregnancy family planning funds to nonprofit corporations which perform abortions, other than hospitals or health maintenance organizations. *Minnesota v. Planned Parenthood of Minnesota*, 48 U.S.L.W. 3846 (June 24, 1980).

The fact remains that the Court continues to employ the rational basis standard in its review of economic and noneconomic regulations. It has never held that any regulation containing a legislative statement of purpose and accompanied by a few substantiating facts will stand. To legitimate such legislative action automatically would indeed be to act as a

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tion, citing McGowan v. Maryland, 366 U.S. 420 (1961). (Pet. Brief pp. 27, 33.) One commentator has noted that although *McGowan* is still relied upon occasionally as authority for ignoring the record, the Court has increasingly shown a willingness to consider the evidence which the parties have introduced. Bennett, *"Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory*, 67 Calif. L. Rev. 1049, 1058 (1979). "[I]f extra-record facts necessarily play a role in what judges determine to be 'reasonably conceivable,' it would be anomolous to exclude facts of record in making that judgment. It would be no less anomolous that facts delimiting what was conceivable were not proved because they were not permitted to be proved." *Id.*

super-legislature. The rational basis standard continues to act as a limit on legislative action, not merely as a foregone conclusion of approval.

The State acknowledges that a statute will fail to satisfy the rational basis standard when the legislative facts upon which it is based are demonstrably false. (Pet. Brief p. 33.) Futhermore, "the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist." *United States v. Carolene Products Co.*, 304 U.S. 144, 153 (1938). The facts introduced by plaintiffs and discussed in Section I convinced the Minnesota courts not simply that the facts are debatable but that the facts upon which the legislature allegedly relied (e.g., that the paperboard container occupies less space in a landfill) were demonstrably false. Therefore, they cannot form a rational basis for the classification contained in the Act. The credible facts demonstrate that the ban on the sale of milk in plastic bottles cannot reasonably be perceived to promote the use of refillable milk containers, ameliorate solid waste management problems or conserve either energy or natural resources.

The Minnesota Attorney General, citing *City of New Orleans v. Dukes*, 427 U.S. 297 (1976), asserts that a legislature may act to ameliorate an existing evil one step at a time. Plaintiffs agree. Likewise, the Minnesota Supreme Court explicitly acknowledged this principle in its opinion. It held, however, that the Act did not represent a step toward amelioration of any existing or perceived evil. (A. 45.)

The *Dukes* case is in obvious contrast to the case at bar. There the legislative body had determined that pushcart vendors, because incompatible with the appearance and custom of the French Quarter, were an evil which it wished to eradicate. By prohibiting all vendors but those which had operated

within the Quarter for at least eight years, the ordinance eliminated all but two vendors, a substantial decrease in the perceived evil. Furthermore, with the passage of time and the death of the two vendors, or their cessation of business for other reasons, the perceived evil would be eliminated altogether. Similarly, the steps upheld in *Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949) and *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955) at least caused a reduction in the quantity and magnitude of the perceived "evil."

In the instant case, however, the statute will do the reverse by legislating total market domination by an environmentally inferior container. Market conditions, consumer preferences, and the failure of the legislature to take any additional steps dictate that paperboard will replace plastic throughout the state. A step was taken by the Minnesota legislature, but it was backward rather than forward.

III. THE ACT IMPOSES UNCONSTITUTIONAL BURDENS ON INTERSTATE COMMERCE.

The Act's burdens on interstate commerce are substantial. The most obvious and severe are those which affect the plastics industry. No natural gas or oil is extracted in Minnesota. None of the refineries producing high-density polyethylene is located in Minnesota. (R. 309.) The machinery used to mold the containers is manufactured outside Minnesota. (R. 242, 244.) Moreover, this is not a situation where marketing in the state is merely made more expensive or difficult; the movement of this raw material and equipment is halted at the Minnesota border. The container is not regulated, it is banned. Meanwhile, Minnesota timber and paper industries are unaffected.

Plaintiff Phillips Petroleum Company would lose between $400,000 and $500,000 annually from the sale of plastic resin to Minnesota customers which mold nonrefillable plastic milk bottles. (R. 309.) Other members of plaintiff The Society of the Plastics Industry, Inc. engaged in the production of resin would be similarly affected. Plaintiff Hoover, the major manufacturer of blow-molding machinery in the United States (R. 244), has already lost $1.5 million in sales in Minnesota because of the pendency or passage of the Act. (R. 247, 254.)

The Act also burdens the operations of dairies with multistate markets. Wells Dairy, Inc., an Iowa dairy which annually sells one million gallons of milk in Minnesota in plastic bottles, would have to reinstitute paper packaging for the milk it ships to Minnesota. Like Wells, Minnesota dairies such as Marigold (56 percent of whose sales are outside Minnesota (R. 46)) and Clover Leaf would be forced to employ two container distribution systems in order to continue to compete in both Minnesota and other states. This would increase their costs of doing business and decrease their already slight profit margins. (R. 346, 427-428.)

Plaintiff M-H Packaging, located in Minnesota, manufactures nonrefillable plastic bottles. Most of its sales are to dairies, many of which are outside Minnesota. (R. 283-284.) The Act would eliminate one-third of its business. (R. 289-290.)

Dairy farmers would also be affected. Those located in other states who seek to market their milk in Minnesota would be deprived of the advantages which the container gives to milk in its competition with other beverages. (R. 455-457.) Minnesota dairy farmers selling to Minnesota dairies which do business in other states would indirectly suffer the same competitive disadvantages encountered by those dairies.

Thus the interstate movement of plastic, machinery, containers and milk, as well as the ability to engage in the business of selling any of these products on a multi-state basis, would be substantially impaired by the statute.

Philadelphia v. New Jersey, 437 U.S. 617 (1978) and *Lewis v. BT Investment Managers, Inc.*, 100 S.Ct. 2009 (1980) articulate the two components of Commerce Clause analysis applicable to this case. The first, a "virtually *per se* rule of invalidity," *Philadelphia v. New Jersey, supra*, 437 U.S. at 624, is applied to statutes which effect economic protectionism. The second, a more flexible balancing of burdens and benefits, is applied to statutes which do not necessarily have this objective or impact. The application of either rule compels the conclusion that the Act contravenes the Commerce Clause.

A. The Act is invalid as a tool of economic protectionism.

The Court has long recognized the evils of economic isolation and protectionism among the states. The promotion of local economic interests is not legitimate when effected by discrimination against interstate commerce. *E.g., Hughes v. Oklahoma*, 441 U.S. 322 (1979); *Philadelphia v. New Jersey, supra; Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977); *Polar Ice Cream and Creamery Co. v. Andrews*, 375 U.S. 361 (1964); *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935). "The clearest example of [economic protectionism subject to virtually *per se* invalidity] is a law that overtly blocks the flow of interstate commerce at a State's borders." *Philadelphia v. New Jersey, supra*, 437 U.S. at 624.

Occasionally, as in this case, discriminatory motives are apparent in legislative history. *See Lewis v. BT Investment Managers Inc., supra*, 100 S.Ct. at 2013; *Hunt v. Washington*

State Apple Advertising Commission, supra, 432 U.S. at 352. The legislative debates show that the Act is couched in laudable terms but founded in discrimination against out-of-state interests.

Once the alleged bases for the bill were challenged by the sponsors' skeptical legislative colleagues, the true purpose of the bill was disclosed. Representative Munger, the chief sponsor in the House of Representatives, admitted that he had not evaluated the environmental issues posed by the bill, recounting instead the evils of the out-of-state plastics industry and the need to protect Minnesota businesses. (R. 119-121.) Recurring themes in the debates included the protection of the Minnesota timber and pulp industry (R. 115, 122, 125) and of the small dairies which would allegedly be unable to compete with the larger ones (i.e., those selling milk in other states). (R. 114-115, 119, 121.) The bill was repeatedly characterized as economic rather than environmental in purpose. (R. 121-122, 124, 129-130.)

Representative Munger expressed particular hostility toward out-of-state interests, chiding a colleague for letting "the guys in the alligator shoes from New York and Chicago come here and tell you how to run your business." (R. 118.) He added:

> I don't think we need to have anybody from New York and the plastics industry to come in here and tell us farmers how to farm. We don't need anyone to come in here to farm the farmer.

(Pl. Ex. J., House debate Mar. 17, 1977, p. 2; R. 112-113.)

Senator Ulland, a supporter of the bill from Duluth, agreed:

> I don't think there is anything the matter with supporting the timber industry which is our third largest employer in the state. I think in fact that is one of our responsi-

> bilities to keep a healthy economy in the state rather than importing petrochemicals and importing plastic bottles from Chicago or wherever they are manufactured certainly the natural resources aren't from here. I am a little bit surprised at Senator Peterson who has a significant number of pulp cutters in his district, would not be terribly concerned with one of their major products.

(Pl. Ex. J., Senate debate May 20, 1977, p. 4; R. 112-113.)

That efforts in Minnesota to adopt container deposit legislation had failed repeatedly suggests that a token act was needed that would appease environmentalist criticism of the legislature without generating opposition from Minnesota business and labor interests. (R. 131-132, 629-630.)

The trial court found that the Act's "actual bases were to isolate from interstate competition the interests of certain segments of the local dairy and pulpwood industries." (A. 22.)

The Court need not, however, find a protectionist motive in order to invalidate the statute as a protectionist measure. "The principal focus of inquiry must be the practical operation of the statute." *Lewis v. BT Investment Managers, supra*, 100 S.Ct. at 2016. A legitimate local purpose will not save a statute whose effects are discriminatory, for "the evil of protectionism can reside in legislative means as well as legislative ends." *Philadelphia v. New Jersey, supra*, 437 U.S. at 626. A different view would render the Commerce Clause meaningless, "save for the rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods." *Dean Milk Co. v. City of Madison, supra*, 340 U.S. at 354.

Thus even if the real purposes of the Act were to alleviate solid waste problems, conserve natural resources and save

energy, it is invalid because it discriminates against interstate commerce in selecting the means to achieve those ends. The out-of-state plastics industry was chosen to bear the burden, and the only Minnesota enterprises affected were those deriving a major portion of their business from interstate commerce.[17]

If the Act's discriminatory purposes and effects do not alone render it invalid, they at least place on the State the burden of demonstrating that there are local benefits derived from the Act and that no reasonable nondiscriminatory alternatives exist. *Hunt v. Washington State Apple Advertising Commission, supra,* 432 U.S. at 353. This burden the State has not met.

As discussed in detail in section I, the purported benefits of the Act are illusory. The Act will aggravate, not ameliorate, solid waste problems. It will not revive returnable milk bottles. It will not conserve energy or natural resources.

Moreover, there is a variety of nondiscriminatory alternatives. The most obvious is to ban both the paper carton and the plastic container. The Minnesota Attorney General argues

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[17] *Philadelphia* and *Hughes,* along with West v. Kansas Natural Gas Co., 221 U.S. 229 (1911) and Pennsylvania v. West Virginia, 262 U.S. 553 (1923), make it clear that a desire to protect the environment or conserve natural resources provides no basis for the erosion of established Commerce Clause criteria. As a solid waste measure, for example, the Act must fall because it "imposes on out-of-state commercial interests the full burden of conserving the State's remaining landfill space." Philadelphia v. New Jersey, *supra,* 437 U.S. at 628.

Decisions upholding actions with resource-related objectives are easily distinguished. Cities Service Gas Co. v. Peerless Oil and Gas Co., 340 U.S. 179 (1950), upheld an order which merely regulated gas prices. In Reeves, Inc. v. Stake, 48 U.S.L.W. 4746 (June 17, 1980) the state acted in its proprietary capacity as a market participant. In Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978), the statute regulated only the ownership of gasoline stations and would not alter the relative market shares of local and out-of-state goods.

that this would create too much disruption. This argument highlights the expediency of discriminatory legislation; it is easy for legislators to choose remedies which do not create burdens for their constituents. *See* L. Tribe, *American Constitutional Law*, §§6-1, 6-5 (1978).

The legislature could also impose deposit requirements on both containers, ban any container which cannot be recycled, create requirements or incentives for recycling programs or provide incentives for the use of refillables. Still another approach would be a comprehensive program for reviewing all new forms of packaging, which is in fact the purpose of Minnesota's Package Review Act (Minn. Stat. §116F.06). This statute, which gives the Minnesota Pollution Control Agency extensive powers to review new packages and containers, was upheld by the Minnesota Supreme Court on the same day that the instant case was decided. *Can Manufacturers Institute, Inc. v. Minnesota, supra.* See *Plastic Bans, Bottle Bills and Comprehensive Container Legislation: Packaging Laws Get Mixed Reviews in State Courts*, 9 Environmental Law Reporter 10193 (Nov. 1979).

These alternatives are not perfect solutions. They would impose local burdens and may therefore be unpopular and difficult to pass. Some of them might impose even greater burdens on interstate commerce than the present statute. The important distinction, however, is that each would create real local benefits, and none would discriminate in this manner against interstate commerce. And the alternatives need not be perfect. Their imperfection is the "type of [imperfection] that the national interest in the free flow of goods between the states demands be tolerated." *Hunt v. Washington State Apple Advertising Commission, supra*, 432 U.S. at 354.

Finally, it must be noted that, to the extent that the Minnesota legislature may have intended to conserve energy, it has chosen a means which the Commerce Clause has reserved to the Congress. To be sure, Congress has solicited the cooperation of the states in addressing energy and environmental problems. But none of the federal statutes cited by the Solicitor General (Brief for the United States as *Amicus Curiae*, pp. 2-4) encourages the states to save energy by banning each other's products. Minnesota is at best attempting to dictate the economic and environmental policies of the gas- and oil-producing states. Those states must supply their own remedies. "One state may not put pressure of that sort upon others to reform their economic [or environmental] standards," *Baldwin v. G.A.F. Seelig, Inc., supra*, 294 U.S. at 524, or "force its own judgments" on such matters on other states "at the pain of an absolute ban on the interstate flow of commerce." *Great Atlantic and Pacific Tea Co., Inc. v. Cottrell, supra*, 424 U.S. at 380.

Our oil and gas are "of profound national importance." *Hicklin v. Orbeck*, 437 U.S. 518, 534 (1978). It is precisely for this reason that if judgments are to be made about the uses which may be made of these resources, they should be made by Congress, not by the legislators of individual states whose constituents are not affected by their actions.

> It is, of course, a quite different thing if Congress through its agents finds such restrictions upon interstate commerce advance the national welfare, than if a locality is held free to impose them because it, judging its own cause, finds them in the interest of local prosperity.

H. P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525, 543 (1949).[18]

Chaos would result if every state were permitted to dictate the manner in which important natural resources found in other states or within its own boundaries may be used.

> We need only consider the consequences if each of the few states that produce copper, lead, high-grade iron ore, timber, cotton, oil or gas should decree that industries located in that state shall have priority. What fantastic rivalries and dislocations and reprisals would ensue if such practices were begun!

Id. at 538-539.[19]

If this statute is upheld, then another state may ban the sale of nylon stockings, another may outlaw acrylic carpeting,

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[18] The unique function of the judiciary is thus particularly important in commerce cases. The judiciary plays an important role in assessing the validity of interstate commerce regulation by the states, because it may be the branch of government most able to provide a check against excessive local assumption of power. When a state legislature determines how much power it has to affect interstate commerce, there may be no inner political check on its action. The incentive to shift burdens to out-of-state interests to which local politicians need not be responsive may be sufficiently great to warrant closer examination of state enactments in the commerce area than of state laws which affect only the local population. When Congress has failed to respond to such shifts by enacting remedial legislation, the concept of the dormant commerce power allows the judiciary to arbitrate the competing state and federal interstate interests. Note, *State Environmental Protection Legislation and the Commerce Clause*, 87 Harv. L. Rev. 1762, 1777-1778 (1974).

[19] It is no answer that Minnesota is not hoarding its own resources but limiting its consumption of the resources of other states.

> It does not matter that the State has shut the article of commerce inside the State in one case and outside the State in the other. What is crucial is the attempt by one State to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade.

Philadelphia v. New Jersey, *supra*, 437 U.S. at 628.

while still another, asserting a shortage of wood,[20] may retaliate by banning wood furniture and cardboard boxes. "Pennsylvania might keep its coal, the Northwest its timber, the mining States their minerals," with the result that "embargo may be retaliated by embargo, and commerce will be halted at state lines." *West v. Kansas Natural Gas Co., supra,* note 17, 221 U.S. at 255. "[T]he door [will have] been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation." *Baldwin v. G.A.F. Seelig, Inc., supra,* 294 U.S. at 522. In the words of Mr. Justice Cardozo:

> The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run, prosperity and salvation are in union and not division.

Id. at 523.

B. The Act imposes burdens on interstate commerce that outweigh its putative benefits.

Even if the Court does not decide that the Act discriminates or effects economic protectionism, the Act must fall under the more flexible balancing test. It "cannot be justified as an incidental burden necessitated by legitimate local concerns." *Lewis v. BT Investment Managers, Inc., supra,* 100 S.Ct. at 2019.

The benefit-burden analysis applied when nondiscriminatory objectives are credibly advanced derives from *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142 (1970):

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[20] Wood and paper shortages are real phenomena. *See Wall St. J.,* July 30, 1979, at 12, col. 1 (East Coast ed.) The Minnesota Attorney General and supporting *amici* seem to suggest that, because trees are renewable, they are in infinite supply.

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. [Citations.] If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

In weighing the putative benefits against the burdens imposed by the statute, the Court must make a "delicate adjustment of the conflicting state and federal claims." *H. P. Hood & Sons, Inc. v. DuMond, supra*, 336 U.S. at 553 (Black, J., dissenting). This requires more than a mere determination that the legislation may further a matter of legitimate state concern. The benefits must be weighed against the burdens on commerce. Even in the field of safety, where unusual deference has been given to state determinations of benefits to be achieved, *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 443-444 (1978), the Court has found benefits to be outweighed by burdens. *Id.; Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959); *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945). The protection afforded by the Commerce Clause cannot be avoided by "simply invoking the convenient apologetics of the police power." *Id.* at 780.

Nor is it sufficient for the State merely to hypothesize the existence of local benefits. As was the case in *Lewis* and *Hunt*, if the asserted benefits do not in fact exist, i.e., if it is not likely that the statute will achieve its asserted purposes, then the statute will fall. Furthermore, even if a legitimate local

interest will be served by the statute, it will not be sustained if "there are means adequate to serve this interest that are substantially less burdensome on commerce." *Great Atlantic and Pacific Co., Inc. v. Cottrell, supra,* 424 U.S. at 376-377.

As already discussed, the benefits of the Act are illusory; its asserted purposes will not be achieved. Effective, less burdensome alternative means to attain the purported objectives do exist. And the burdens on commerce are substantial. Under these circumstances the Act cannot withstand constitutional challenge.

CONCLUSION

The recitation of undisputed constitutional standards will not resolve this case. Its resolution turns instead on the application of those standards to the facts.

The Minnesota Attorney General equates rationality analysis with legislative infallibility. The Constitution, however, imposes limits on legislative action, and those limits have been reached in this case.

Contrary to the assertions of the Minnesota Attorney General, this Court's affirmance of the Minnesota decision will not preclude a legislature from taking a step-by-step approach to environmental problems. The legislature's power to do so is undisputed. The holding in this case is limited to its facts, which show no such step taken, no credible basis upon which to believe that the classification contained in the Act will further its alleged purposes, and a political setting in which the out-of-state plastics industry was easily sacrificed to local industries and environmental proclamations.

Plaintiffs respectfully request the Court to affirm the decision of the Minnesota Supreme Court that the Act violates the

Equal Protection Clause of the Fourteenth Amendment or, alternatively, to affirm that decision on the ground that the Act contravenes the Commerce Clause.

Respectfully submitted,

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